SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM—~~1965~~ 1966

No. [redacted] 71

In the Matter of

LANDON ZUCKERMAN AND SAM HABER,
Petitioners,

against

SAMUEL GREASON,
Respondent.

TO THE HONORABLES, THE CHIEF JUSTICE OF THE UNITED STATES, AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, SECOND DEPARTMENT

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TABLE OF CONTENTS

	PAGE
Opinions Below	2
Jurisdiction	2
Proceedings Below	2
Questions Presented	4
Constitutional Provisions Involved	6
Statutes and Rules Involved	6
Statement	7
Reasons for Allowance of Writ	14

Index to Appendix

Order of Disbarment of Petitioner, Landon Zuckerman and Suspension of Petitioner, Sam Haber, dated March 3, 1965	1a
Opinion on Order of Disbarment and Suspension	6a
Notice of Appeal of Petitioner Landon Zuckerman to Court of Appeals	9a
Order on Motion by petitioner Landon Zuckerman for Reargument or For Leave to Appeal to Court of Appeals, dated April 15, 1965	10a
Order on Motion by petitioner Sam Haber for Reargument or for Leave to Appeal to the Court of Appeals and for a Stay	11a
Notice of Appeal by petitioner Landon Zuckerman to Court of Appeals, dated April 28, 1965	12a

PAGE

Notice of Appeal to Court of Appeals by petitioner Sam Haber dated March 29, 1965 ..... 13a

Order of Court of Appeals Dismissing Appeal of Petitioner Sam Haber 14a

Order of Court of Appeals Dismissing Appeal of Petitioner Landon Zuckerman 15a

Cases Cited

Aiken v. *Martin*, 11 Paige 499 (N. Y. 1845) 18

Matter of Anonymous Nos. 6 and 7 v. *Baker*, 360 U. S. 287, 79 S. Ct. 1157 (1959) 13n., 15

In re Atlas Lathing Corp., 176 Misc. 959, 29 N. Y. S. 2d 458 18

Cohen v. *Hurley*, 366 U. S. 117, 81 S. Ct. 954 (1961) 19

Ferguson v. *Georgia*, 365 U. S. 570, 81 S. Ct. 756 18

Finch & Co. v. *McKittrick*, 23 F. Supp. 244, aff'd 305 U. S. 395, 59 S. Ct. 256 18

Gallman v. *State*, 29 Ala. App. 264, 195 So. 768 17

Hayes v. *Missouri*, 120 U. S. 68, 7 S. Ct. 723 18

Matter of Mathot, 222 N. Y. 8, 117 N.E. 948 18

In re Murchison, 349 U. S. 133, 75 S. Ct. 623 (1955) 14

N.A.A.C.P. v. *Button*, 371 U. S. 415, 83 Sup. Ct. 328 (1963) ..... 15n.

Offutt v. *United States*, 348 U. S. 11, 75 S. Ct. 11 (1954) 15

Perlman v. *Firestone Rubber Co.*, 244 F. 304, aff'd 247 U. S. 7, 38 S. Ct. 417 (1918) 18

PAGE

In re Randall, 87 App. Div. 245, 84 N. Y. S. 294 18

In re Remy Sportswear, 16 Misc. 2d 407, 183 N. Y. S. 2d 125 18

Reynolds v. *Cochran*, 365 U. S. 525, 81 S. Ct. 723 18

Matter of Schlesinger, 404 Pa. 584, 172 A. 2d 835 14

State v. *Papa*, 32 R. I. 453, 80 Atl. 12 17

Thomas v. *Dunn*, 6 Manning & Granger 274 18

Tumy v. *State of Ohio*, 273 U. S. 510, 47 S. Ct. 437 (1927) 15

United States v. *B. Goedde*, 40 F. Supp. 523 18

Wilson v. *State*, 93 Ga. App. 229, 91 S. E. 2d 201 17

Wong Young Sung v. *McGrath*, 339 U. S. 33, 70 S. Ct. 445 (1950) 15

Rules Cited

Rule 7, Special Rules of Appellate Division, Second Department 7

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The petitioners above named respectfully pray that a Writ of Certiorari issue in the above captioned case, directed to the Supreme Court of the State of New York, Appellate Division, Second Department, to review its order dated March 3, 1965, and entered in the office of the Clerk of that court on March 11, 1965 (A. 1a).

Opinions Below

The only opinion (A. 6a)[1] below was that which accompanied the order of the Appellate Division of the Supreme Court of the State of New York, Second Department (A. 1a) reported in 23 A. D. 2d 825 (1965), 259 N.Y.S. 2d 963 (1965).

There were no opinions by the Court of Appeals.

Jurisdiction

The order of the Court of Appeals, which finally determined this proceeding in New York, was dated and entered October 21, 1965. The time within which this petition for a writ of certiorari may be filed will expire on February 18, 1966, pursuant to the order of Mr. Justice Harlan dated January 11, 1966. The jurisdiction of this honorable Court is invoked under Title 28, United States Code, Section 1257.

Proceedings Below

Petitioner, Landon Zuckerman, was the respondent in a disciplinary proceeding brought against him by Samuel Greason, Chief Counsel for the Judicial Inquiry on Professional Conduct for the County of Nassau, State of New York. In another proceeding brought against Mr. Zuckerman's law partner, petitioner Sam Haber, the identical charges as were made against Mr. Zuckerman were made against Mr. Haber. Both proceedings were tried together by agreement of the parties (see pages 11-14 of the transcript of testimony), but with the clear understanding that the evidence as against each of petitioners would only be applied as against the petitioner who might be involved in such testimony, as the case

1. Parenthetic references are to the Appendix hereto unless otherwise noted.

might be (see pages 5, 11, 34-36, 264, of the transcript of testimony).

The petitions charging professional misconduct to the petitioners here were dated July 14, 1961. Pursuant to the practice followed by the Appellate Division, Second Department of the State of New York, a referee was designated to hear and report to that Court on both petitions with his opinion thereon.

On June 6, 1964, the Referee reported to the Appellate Division that so far as petitioner Zuckerman was concerned, Charges 5A, 5B, 5F and 5H had been sustained. With regard to petitioner Haber, only Charges 5B, 5F and 5H were sustained. The charges involved are detailed at pages 7 and 8, *infra*. The Referee recommended that petitioner Zuckerman be disbarred and that petitioner Haber be suspended for two years. The Appellate Division in a single order (A. 1a) confirmed the Referee's report to the extent that the petitioner Zuckerman was disbarred, but petitioner Haber was suspended for five years rather than two; 23 A. D. 2d 825, 259 N.Y.S. 2d 963.

Petitioners then timely moved for reargument or leave to appeal to the Court of Appeals. These motions were denied in their entirety, without opinion[2] by separate orders, both dated April 15, 1965 (A. 10a, 11a).

Petitioners then timely served and filed Notices of Appeal as of right (A. 12a, 13a).[3]

2. Not reported.

3. In his Notice of Appeal, petitioner Zuckerman specifically raised Article I, section 10 and the Fourteenth Amendment of the United States Constitution, and Article 1, section 6, of the Constitution of the State of New York. In addition and on those items of complained of error not involved in the constitutional issues, petitioners timely moved in the Court of Appeals of New York for leave to appeal. The Court of Appeals denied those motions without opinion, 16 N. Y. 2d 482, N. E. 2d

Petitioners thereafter moved for leave to prosecute their pending appeals as of right on the original record in the Appellate Division, Second Department, and in opposition thereto respondent cross-moved to dismiss petitioners' appeals as of right, on the ground that no substantial constitutional question was directly involved on petitioners' appeals. The Court of Appeals, on October 21, 1965, denied petitioners' motions and granted respondent's cross-motions to dismiss without opinion.[4]

The ground stated by the separate orders of the Court of Appeals for granting the cross-motions to dismiss the appeal as of right, was that no substantial constitutional question was presented on either appeal (A. 14a, 15a).

All available remedies in the State of New York have now been exhausted and proceedings in the State courts are concluded and final.

Questions

1. Can the same court investigate, determine to prosecute, prefer the charges against, prosecute and determine the guilt or innocence of an attorney and then discipline such attorney without being held to have denied due process to such attorney within the contemplation of the Constitution of the United States?

2. To what extent may an attorney be denied the simplest constitutional rights available to all others? In the absence of a statutory provision therefor, and contrary to the rights of all other citizens, may an attorney be disciplined for refusing to turn over possession of his personal records to a disciplinary investi-

4. Not officially or unofficially reported as of the drawing of this petition.

gation, and is discipline for such refusal a denial of due process and of the equal protection of the laws?

3. Is the simple assertion of the most basic constitutional right unavailable to an attorney? When, in response to a demand therefor, an attorney makes a full disclosure of his files and records to a disciplinary investigation, but, as all other citizens may do, asserts his constitutional privilege in aid of his refusal to turn over physical possession of all of his records, turnover of which was demanded without any showing of the relevancy of such turnover to the proceeding, may such attorney be disciplined for failing to "cooperate" in the absence of any statutory requirement for such turnover, and is such discipline a denial of due process and the equal protection of the laws?

4. When, long prior to the adoption by two out of the four departments of the Appellate Division in New York of a special rule of conduct relating to the taking of an adversary *party* statement at a time when such adversary is represented by counsel, an independent third party licensed investigator, without authorization from the attorney, takes a statement from a witness in the course of a preliminary investigation to determine the existence of a claim, may the attorney be disciplined by an *ex post facto* application and amplification of the rule, and is such discipline a denial of due process and the equal protection of the laws?

5. May a local court adopt a special rule of conduct applicable only to attorneys practicing within its local geographic limits the effect of which is to unfairly discriminate against such attorneys as compared to other

attorneys practicing within the state and which discrimination also affects clients' rights to proper representation?

6. Where two separate disciplinary proceedings against two attorneys are consolidated for the purposes of trial and the trier of the facts fails to make a finding of wrongdoing as against either attorney (except, in the case of one of them, the refusal to turn over physical possession of records) and, with regard to the other charges, makes his findings in such manner as to make it impossible to tell what facts were found and as against which attorney, but concludes the guilt of each attorney, is the failure to make separate findings as to each attorney a denial of due process?

Constitutional Provisions Involved

United States Constitution, Article I, Section 10:

> "No State shall • • • pass any • • • ex post facto Law, • • •"

United States Constitution, Fourteenth Amendment:

> "Section 1. • • • nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Constitution of the State of New York, Article I, section 6 (as pertinent):

> "No person shall be deprived of life, liberty or property without due process of law."

Statutes and Rules Involved

Special Rules of Appellate Division, Second Department, adopted July 1, 1960, relating to conduct of attorneys:

"Rule 7

Prohibition of communication with adverse party.

No attorney shall communicate directly or indirectly upon the subject of any pending claim or action with an adverse party plaintiff or defendant known to him to be represented by attorney without the latter's knowledge and consent, nor shall he permit any claim agent or other representative of his client to interview an adverse party plaintiff or defendant or obtain any statement from him, or make any settlement with him without the knowledge and consent of the latter's attorney."

Statement

Although there were numerous other charges against petitioners which both the Referee and the Appellate Division found had not been sustained, the four charges upon which affirmative findings were made, read as follows:[5]

"5A. The respondent has deliberately refused to cooperate with the Court in its efforts to expose unethical practices, and in its efforts to determine whether he has committed any acts of professional misconduct which destroyed the character and fitness required of him as a condition to his retention of the privilege of remaining a member of the bar."[6]

"5B. The respondent Landon Zuckerman has submitted misleading, exaggerated and false medical bills and statements covering lost time and earnings for the purpose of inducing various insurance companies to part with money in reliance thereon."

"5F. The respondent Landon Zuckerman has built up medical bills for submission to insurance

5. The petition against petitioner Haber was drawn in identical language except for the name of said petitioner in place of the name of petitioner Zuckerman.

6. Charge 5A was not found proven as against petitioner Haber by either the Referee or the Appellate Division (A1a):

companies by referring claimants to a succession of doctors, orthopedists, neurosurgeons, etc."

"5H. The respondent Landon Zuckerman has improperly and in violation of the Canons of Ethics used investigators to sign up retainers, to obtain adversary statements from parties represented by attorneys, and by having blank guardian ad litem forms signed by claimants."

Regarding Charge 5-A[7]

It would appear from a reading of the record insofar as the issue of non-cooperation (i. e., failure to "turn-over" and give custody of certain check stubs and cancelled vouchers to respondent) is concerned, that the then counsel for petitioner and counsel to respondent were interested in the issue for the sake of the issue rather than for any actual failure to cooperate.

(The following testimony was given by petitioner Zuckerman in the presence of petitioner, and Messrs. Hanrahan, Capilli and Byrnes, members of respondent's staff directly involved in the incident, and uncontradicted by them:)

"Q. When Mr. McCann (respondent's then counsel) advised the inquiry of this *Internal Revenue* investigation and its possible effects, will you tell us in substance if you don't recall the precise words, what was said by Mr. McCann and what was said by any member of the inquiry staff who may have been present, identifying such member, if you will. A. We had a conference. Judge Greason was present. Mr. Capilli, Mr. Hanrahan and Mr. Byrnes was present. I was there. Mr. Haber was there. Mr. McCann was there.

7. This portion of the statement refers only to petitioner Zuckerman and does not refer to petitioner Haber for as to him the Referee found and the Appellate Division sustained that Mr. Haber, "* * * did nothing, in my opinion, to impede the investigation." (Referee's report, pages 8-10)

We discussed the fact that did the Judicial Inquiry have a right to the books, right to the check stubs where Internal Revenue was conducting an independent investigation at the same time covering the same years. And they argued for some time and Mr. Hanrahan and Mr. McCann particularly had quite a discussion on the law and then *it was finally decided* between them that the Judicial Inquiry would serve a subpoena on Zuckerman & Haber and we agreed to accept the subpoena and we would *test out the law* on the question of the check stubs being available to the Judicial Inquiry when *Internal Revenue* was making an investigation.

"Q. So that we understand you correctly, these subpoenas which are here in evidence now (Exs. 4A, 4B) are not subpoenas which were issued because of any refusal on your part to comply with the production of any records of check stubs but were, rather, subpoenas which were issued for the purpose of testing some intricate legal question that Mr. McCann and Mr. Hanrahan saw with regard to this issue that had been raised concerning *Internal Revenue,* is that right? A. That is the impression I got from listening to the discussion" (transcript of testimony, 584-585) (emphasis supplied).

• • • • •

"Q. This was an academic issue, is that right, the question of whether they had the right to compel the turnover? A. That is correct, sir, they wanted all of them turned over to them" (transcript page 587).

• • • • •

(From the cross-examination of Mr. Byrnes, respondent's chief investigator:)

"Q. I am not raising issue with the fact that this may have been a policy matter. I am raising issue only as regards what the fact was. The fact was you wanted these checks and check stubs in your possession for your own examination. When I

say yours, I mean the Judicial Inquiry. A. Yes. That is basically correct, sir" (transcript page 465).

That the only issue before Mr. Justice Gulotta (who was designated to preside over the investigation by the Appellate Division) was "turnover" as distinct from "inspection" or "cooperation" appears from the following statement made by Mr. McCann, petitioner's then attorney, to Mr. Justice Gulotta:

> "The *only question* that I would like to have your Honor consider, and this is as to the entire financial records, I think it is unfair to say, turn them over. If they (the inquiry) want to go over their books with the respondents, it is perfectly satisfactory to us as respondents" (transcript page 54, emphasis supplied).

Counsel for petitioner and counsel to respondent apparently succeeded in confusing Mr. Justice Gulotta rather than resolving the intricate legal issue which they had contrived, for Mr. Justice Gulotta ruled as follows:

> "• • • I find that the *examination* of books and records, in view of the testimony that has gone before, are both relevant and material" (transcript pages 55-56, emphasis supplied).

The Inquiry ignored completely the fact that it was seeking possession of privileged communications as well as those which were not. The inquiry also ignored completely the fact that it was seeking to compel Mr. Zuckerman to relinquish possession of records which relinquishment could very seriously impair Mr. Zuckerman's rights viz-a-viz the Internal Revenue Service.

Apparently neither side had been able to make it clear that examination was not an issue. The issue was "turnover". Examination had been had and was always available.

It is obvious then that the only issue before Justice Gulotta was the "refusal to relinquish possession."

The transcript conclusively establishes that so far as "cooperation" was concerned—at least insofar as cooperation normally and reasonably may be measured by the making available of records, permitting records to be copied and answering any and all questions—the petitioner Zuckerman as well as petitioner Haber cooperated fully and unconditionally. The inquiry into the affairs of the petitioner started in December, 1959, and continued until well in 1961 (447). Between 150 and 200 cases handled by petitioner were inquired into and discussed with the respondents (440). There were eleven sessions at which either petitioner or his law partner attended to supply information to the Inquiry staff (exclusive of appearances before Mr. Justice Gulotta); and 4 telephone sessions (450-451).

Files were produced and left with respondent for examination (transcript 452-453). Copies of records supplied by petitioner were made by respondent (transcript 454-455).

The respondent examined and made notes from the check records of petitioner (transcript 455-457, 468-469, 578-580) and every question, including those which petitioner later refused to answer, was answered by petitioner before he asserted his privilege (transcript 572, 574, 575, 580-581).

Regarding Charges 5B and 5F

Here the Referee's report made no distinction between either petitioner or the members of their staff and office as to who did what. Everything was lumped together and the charges held sustained as against petitioners with nothing in the report or the opinion of the Appellate Division to show what the Referee or the Court found

that the petitioners had done (see Referee's report in record). No specific act of misconduct by petitioners was found by the Referee.

The record below shows that the petitioners testified to a complete lack of knowledge of any impropriety in the handling of bills of particulars or referrals to specialists for consultation and the respondent stipulated as follows:

> "It is hereby stipulated and agreed by and between the attorneys for the respective parties hereto that the petitioner (respondent here) does not intend to raise any issue as to the testimony of the respondents (petitioners here) regarding their office procedures in connection with the preparation and verification of bills of particulars and examinations before trial."

With regard to Charge 5F, the respondent stipulated, at pages 951-952 of the transcript, that:

> "We recognize, of course, that in any negligence case the attorneys for the plaintiff, if they think it is advisable, have the right and duty to send their patients to specialists, orthopedists, neurologists and whatnot, if the facts in the particular case seem to indicate that it is proper."

Although respondent produced evidence that in only 13 out of more than 800 cases handled, petitioners' law firm had referred clients to medical specialists for evaluation, respondent didn't even attempt to prove that such referral was other than perfectly proper. As a matter of fact, the evidence that petitioners never attempted to influence the conclusions or findings of any specialist, never requested a specialist to modify his report and never sent a client to a specialist to build up medical bills, is completely uncontradicted on the record.

With regard to Charge 5B, there was absolutely no evidence that any medical bills were false, let alone known

to petitioners to be false. There was no evidence that petitioners ever knowingly submitted a false bill of particulars or lost earnings statement in the course of litigation.

In not a single aspect of these two charges does the Referee's report find any improper conduct on the part of either petitioner.

Charge 5H

Although this charge contained many specifications, the Referee considered only that aspect dealing with "adversary statements" and the charged violation of Special Rule 7 (Referee's report pp. 52-55).

In dealing with that charge and although the alleged adversary party statements were taken by petitioners' investigator without instructions from petitioners so to do, and although the statements were taken long prior to the adoption of Special Rule 7 (the rule was adopted July 1, 1960), and, without exception, all statements were taken before any claim had been asserted or any action had been started and the statements for the most part were the oral statements of *witnesses* reported by the investigator and not of parties, the Referee found that Special Rule 7 applied and that, contrary to its specific language, it applied to witnesses as well as to parties and that it applied even though the alleged violations occurred long prior to July 1, 1960.

The Proceeding Itself

The proceeding out of which the petitioner were ultimately disciplined, operated in the following manner:[7]

7. There is no change from the factual genesis of this proceeding as compared to the proceeding described in *Anonymous Nos. 6 and 7* v. *Baker*, 360 U. S. 287, 79 S. Ct. 1157, decided June 15, 1959, wherein a preliminary inquiry was had and a report thereon rendered

1) The Appellate Division, Second Department, ordered an investigation into the conduct of attorneys in Nassau County specializing in personal injury cases and designated Mr. Justice Gulotta to conduct that investigation. Respondent was appointed by the Appellate Division as counsel to that inquiry..

2) Mr. Justice Gulotta and respondent conducted an inquiry into petitioners' conduct and following that inquiry Mr. Justice Gulotta reported the results thereof to the Appellate Division.

3) On the basis of that report the Appellate Division ordered that charges be brought against petitioner and appointed a referee to hear and report.

4) Following the hearings the Referee reported to the Appellate Division and on the basis of the Referee's report the petitioners were disciplined.

Reasons for Allowance of the Writ

1.

Where a single agency acts as investigator, drawer of charges, prosecutor and judge a fundamental violation of due process occurs.

In re Murchison (1955), 349 U. S. 133, 75 S. Ct. 623;

Matter of Schlesinger, 404 Pa. 584, 172 A. 2d 835;

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to the Appellate Division, Second Department. Thereafter, and with regard to petitioners, the Appellate Division, Second Department, ordered that a disciplinary proceeding be brought against petitioners and referred the matter to the Referee to hear and report. (See pp. 1 and 2 of the affidavit of respondent, dated September 22, 1965, and contained in the certified record of the Court of Appeals submitted on this petition.)

Wong Young Sung v. *McGrath,* 339 U. S. 33;
Tumy v. *State of Ohio,* 273 U. S. 510, 47 S. Ct. 437;
Offutt v. *United States,* 348 U. S. 11, 75 S. Ct. 11.

In the case at bar the Appellate Division, Second Department, decided to investigate, investigated by its own arm, decided to prosecute, prosecuted and concluded the petitioners' guilt and then meted out the discipline it considered appropriate to the offense. The Appellate Division did all of this in the absence of any published rules of procedure or statutory authority therefor. Although in New York the respective Appellate Divisions have supervision over the conduct of attorneys, there is no statute or rule of court which authorizes them to conduct their own investigations, draw their own conclusions, hold their own hearings and draw their own conclusions thereon. It cannot be overlooked that in the case at bar the Appellate Division, Second Department, directed that charges be brought after considering the results of its own investigation (see affidavit of Samuel Greason dated September 22, 1965 on motion in the Court of Appeals to dismiss petitioner's appeal as of right).

In the case at bar there wasn't even the intervention of an independent bar association bringing the charges and carrying the burden of prosecution. Everything that was done here was done under the direction and control of a single court.

Although the investigative procedures followed in New York were approved by this honorable Court in *Matter of Anonymous Nos. 6 and 7* v. *Baker, supra,* this Court never reached and has not as yet decided the broader question of the same court not only concluding that charges should be brought against an attorney on the

basis of its own secret inquiry, but then hearing the charges and passing on the guilt or innocence of the attorney on substantially the same evidence as induced the decision to prefer the charges in the very first instance.

It is respectfully submitted that in our constitutional scheme of things such a procedure fails to meet constitutional standards of due process.

2.

It is elemental that a rule which has no retrospective provisions cannot be violated before its adoption.

To have extended Special Rule 7 to include "witnesses", when the Rule speaks only of an "adverse party" in a "pending claim or action" is bad enough. To then give the Rule retrospective effect is to pass an "ex post facto" law. The fact that a disbarment or a five year suspension is a penalty partaking almost of a criminal conviction need not be argued. To disbar a lawyer on an ex post facto application of a rule extended beyond its own clear and unambiguous language is a denial of a fundamental constitutional right.

Of the six witnesses' "statements" referred to in the Referee's report, only one was in writing (Cox). Of the other five, four "statements" were nothing more than the investigator's reports of his interviews with those witnesses (1381-1384). Of the fifth there was no evidence that any statement ever existed or any interview actually had (1364). The latest "statement" taken (Cox) was taken on May 27, 1959, more than a year prior to the adoption of Special Rule 7.

Respondent conceded that he could not prove that petitioners ever instructed the independent investigator

involved to take the statements of so-called "adverse witnesses" (1351-1352) and the Referee found that no such instructions had ever been given by petitioners (Referee's Report, p. 53).

The Referee's unwarranted extension of Special Rule 7 to witnesses, and the adoption of that extension by the Appellate Division, was in direct violation of Canon 39 of the Canons of Professional Ethics, of the New York State Bar Association in force at the time the alleged "statements" were taken. In addition, the Referee's extension of the Rule to witnesses flies in the face of established law as to the duty and obligation of attorneys to interview all witnesses who might shed light on the issues.

> *State* v. *Papa,* 32 R. I. 453, 80 Atl. 12;
> *Wilson* v. *State,* 93 Ga. App. 229, 91 S.E. 2d 201;
> *Gallman* v. *State,* 29 Ala. App. 264, 195 So. 768.

In extending the Rule to witnesses the Referee equated "attorneys" with "insurance companies". The Referee argued that a witness who has insurance which covers the accident in which the witness was involved may not be interviewed (Referee's Report, p. 53). The effect of this is to insulate all witnesses from investigation for there are few persons who are not covered by insurance—at least in New York, where compulsory insurance for motor vehicle accidents is the rule.

Under the Referee's extension of the Rule, a plaintiff's attorney whose office is in the Second (or First) Department could not interview witnesses who are insured even in a suit brought in the Third or Fourth Departments, while his adversary in those departments would suffer no such disability. This unequal treatment of attorneys within the State of New York constitutes an unconstitu-

tional classification and would deny to a litigant in the Second Department the opportunity to have as effective representation as a litigant in the Third or Fourth Departments.

Finch & Co. v. *McKittrick,* 23 F. Supp. 244, 246-247, aff'd 305 U. S. 395; 59 S. Ct. 256;
Hayes v. *Missouri,* 120 U. S. 68, 71, 7 S. Ct. 350;
Reynolds v. *Cochran,* 365 U. S. 525, 81 S. Ct. 723;
Ferguson v. *Georgia,* 365 U. S. 570, 81 S. Ct. 756.

3.

In New York a disciplinary proceeding is a special proceeding governed by the civil rules of procedure.

Matter of Mathot, 222 N. Y. 8, 9.

A subpoena duces tecum, the device used here to cause petitioner Zuckerman to produce his records, could not be used for discovery or to compel petitioner to turn over possession of his records.

Thomas v. *Dunn,* 6 Manning & Granger, 274;
Aiken v. *Martin,* 11 Paige 499 (N. Y. 1845);
In re Randall, 87 App. Div. 245;
In re Atlas Lathing Corp., 176 Misc. 959;
Perlman v. *Firestone Rubber Co.,* 244 F. 304, affirmed 247 U. S. 7;
U. S. v. *B. Goedde,* 40 F. Supp. 523;
In re Remy Sportswear, 16 Misc. 2d 407.

The petitioner was clearly within his rights when he offered to produce all his records and answer any question, but refused to turn over possession of his papers and records. Certainly, the issue of privileged communications had to be considered in determining that which the

Inquiry should see. The Inquiry used the device of the subpoena to not only attempt to obtain possession of all of petitioner's records, but included privileged communications within its demand.

Here, then was an application of *Cohen* v. *Hurley*, 366 U. S. 117, 81 S. Ct. 954, never even suggested by this Court. *Cohen* did not hold that a disciplinary inquiry could compel an attorney to hand over possession of any and all records on risk of disbarment for refusal to do so. Especially, *Cohen* did not hold, where an attorney had produced his records, permitted investigation thereof, and answered questions with relation thereto, that he could be disbarred for asserting his privilege against being compelled to turn over possession of those records.[8]

4.

It is too fundamental to require argument that a judgment as severe as disbarment or a five year suspension, which is tantamount to a disbarment in practical effect, based on a finding which does not set forth what it is that the individual petitioners have done violates the very fundamentals of fairness which is the basis of our concept of due process. Not only must a charge be specific, but the ultimate judgment must state the findings made with regard to the particular charge. If two persons are accused of an identical act the finding must be that one or the other or both were guilty of the act. The Referee's report (with the exception of Charge 5A) contains no

8. The thrust of *Cohen* seems largely to have been dissipated by this honorable Court by dint of its holding and reasoning in *N.A.A.C.P.* v. *Button*, 371 U. S. 415, 83 Sup. Ct. 328 (1963). Even in *Cohen* the issue of what procedural constitutional rights are available to attorneys was left open, 366 U. S. 117, 129-130 and limited the decision to the investigative phase of a disciplinary proceeding, as distinct from its trial phase.

such finding. A reading of the Referee's report fails to disclose what petitioners or either of them did that was reprehensible with regard to Charges 5B and 5F. The conclusion of petitioners' guilt appears, but the facts as to what either or both of the petitioners did upon which the Referee and the Court based such conclusion so far as petitioners were concerned nowhere appears. All that the Referee did was to selectively detail some of the evidence and then, without attempting to connect that evidence to either or both of the petitioners, found both petitioners guilty of the charges. Although the Referee's report is lengthy, which petitioner, if either, did what and why such conduct was wrong, does not appear.

CONCLUSION

It is respectfully submitted that the constitutional issues require this honorable Court to grant the writ sought.

Respectfully submitted,

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New York, New York.

APPENDIX

Order of Disbarment of Respondent Landon Zuckerman, and Order of Suspension of Respondent Sam Haber

At a Term of the Appellate Division of the Supreme Court of the State of New York held in and for the Second Judicial Department at the Borough of Brooklyn, on the 3rd day of March, 1965

Present—Hon. MARCUS G. CHRIST, Acting Presiding Justice
" ARTHUR D. BRENNAN,
" L. BARRON HILL,
" SAMUEL RABIN,
" JAMES D. HOPKINS, Justices.

[SAME TITLE]

Proceedings having been instituted by Samuel Greason, Esq., by petitions verified the 12th day of July, 1961, in respect to Landon Zuckerman, an attorney and counselor at law admitted by the Appellate Division of the Supreme Court, Second Judicial Department, on December 14, 1949, under the name of Landon R. Zuckerman; and in respect to Sam Haber, an attorney and counselor at law admitted by the Appellate Division of the Supreme Court, Second Judicial Department, on December 15, 1953, petitioning for orders directing that said respondents Landon Zuckerman and Sam Haber, as attorneys and counselors at law, be disciplined upon the charges set forth in said petitions and why such other and further action upon the charges embodied in said petitions, as justice may require, should not be had and for such other and further relief in the premises as may be just and proper, and the respond-

Order of Disbarment of Respondent Landon Zuckerman, and Order of Suspension of Respondent Sam Haber

ents having filed verified answers, and this court by orders dated and entered September 25, 1961, having referred the issues raised by the petitions and answers to George C. Wildermuth, Esq., as Referee, for hearings and reports, together with his recommendations, and the said Referee having held hearings and filed his report dated June 6, 1964 in this court on July 27, 1964, and the petitioner having moved by notice of motion, dated September 9, 1964 (1) to confirm the Referee's report with respect to the Referee's findings as to charges 5-A, 5-B, 5-D, 5-F and 5-H; and (2) to disaffirm the report only insofar as the Referee found three of the charges (5-C, 5-E and 5-I) not to be sustained, and insofar as he recommends their dismissal; and the respondents having each cross moved, by notices of cross motions dated September 14, 1964 and September 15, 1964 to affirm in part and to disaffirm in part the Referee's findings, and to dismiss the petitions.

Now on reading and filing the notice of motion of petitioner, the memorandum of petitioner, the petitions, answers, the report of George C. Wildermuth, Esq., the testimony and exhibits, notices of cross motions and memoranda of respondents, and all the papers filed herein, and Mr. Samuel Greason, petitioner, appearing in person, and Mr. Leonard Feldman appearing for respondent Landon Zuckerman, and Messrs. Caputo and Levine appearing for respondent Sam Haber, and due deliberation having been had thereon; and upon the opinion and decision slip of the court herein, dated March 3, 1965, heretofore filed, and made a part hereof: it is

Order of Disbarment of Respondent Landon Zuckerman, and Order of Suspension of Respondent Sam Haber

Ordered, that part of petitioner's motion to affirm the Referee's findings as to the four charges: 5-A, 5-B, 5-F and 5-H, be and the same hereby is granted; and that part of the petitioner's motion to disaffirm the Referee's findings as to charges 5-C, 5-E and 5-I, be and the same is denied; and it is further

Ordered that respondent Landon Zuckerman, admitted as Landon R. Zuckerman, is found guilty of charges 5-A, 5-B, 5-F and 5-H; and, based upon such guilt, the said respondent be and he hereby is disbarred from practice as an attorney and counselor-at-law in the State of New York, effective thirty days after entry of this order; and it is further

Ordered that the name of the said Landon Zuckerman, admitted as Landon R. Zuckerman, be struck from the roll of attorneys and counselors-at-law in the State of New York, effective thirty days after entry of this order; and it is further

Ordered, pursuant to the provisions of the Judiciary Law of the State of New York, that the said Landon Zuckerman, admitted as Landon R. Zuckerman, is hereby directed to desist and refrain from the practice of law in any form, either as principal or as agent, clerk or employee of another, and he is forbidden to appear as an attorney and counselor-at-law before any court, judge, justice, board, commission or other public authority, or to give to another an opinion as to the law, or its application, or any advice in relation thereto; and it is further

Order of Disbarment of Respondent Landon Zuckerman, and Order of Suspension of Respondent Sam Haber

Ordered that the respondent Sam Haber, be and he hereby is found guilty of charges 5-B, 5-F and 5-H, and, based upon such guilt, it is further

Ordered that the respondent Sam Haber, be and he hereby is suspended from the practice of law for a period of five years, commencing thirty days after entry of this order; and it is further

Ordered, pursuant to the provisions of the Judiciary Law of the State of New York, that the said Sam Haber is hereby directed to desist and refrain from the practice of law in any form, either as principal or as agent, clerk or employee of another, and he is forbidden to appear as an attorney and counselor-at-law before any court, judge, justice, board, commission or other public authority, or to give to another an opinion as to the law, or its application, or any advice in relation thereto; and it is further

Ordered that the suspension of said Sam Haber hereby ordered shall continue until the further order or orders of this court permitting the said Sam Haber to resume the practice of the law which may be granted upon proof that the said Sam Haber has not practiced law as hereinabove set forth in the State of New York during the period of suspension, and has been of good moral character, proof of such good character on the part of Sam Haber, to be of the same nature and form as is required of applicants for admission to the Bar; and it is further

Ordered that the respondents' cross motions insofar as they seek a dismissal of the petition be and the same are

Order of Disbarment of Respondent Landon Zuckerman, and Order of Suspension of Respondent Sam Haber

denied; and respondents' cross motions insofar as they seek to affirm in part and to disaffirm in part the Referee's findings be and the same hereby are dismissed as unnecessary in view of the disposition made upon the petitioner's motion.

Enter:

JOHN J. CALLAHAN
Clerk

Opinion on Order of Disbarment and Suspension

(Filed March 3, 1965; published, N.Y.L.J. March 4, 1965)

By CHRIST, Acting P.J.; BRENNAN, HILL, RABIN and HOPKINS, JJ.

Matter of Landon Zuckerman and Sam Haber, attorneys —This is a proceeding to discipline respondents, attorneys, based on nine charges or specifications of professional misconduct (Nos. 5-A to 5-I) arising out of the recent Judicial Inquiry into Unethical Practices of Attorneys in Nassau County. The special referee to whom the issues were referred has held extensive hearings and has filed his report. The referee found that one of the charges (5-A) was sustained in so far as the respondent Zuckerman was concerned, but recommended its dismissal as to the respondent Haber. As to both respondents, the referee found that three of the other charges (5-B, 5-F and 5-H) were sustained by the proof. The referee recommended dismissal of the remaining five charges (5-C, 5-D, 5-E, 5-G and 5-I). He recommended the respondent Zuckerman's disbarment on charges 5-A, 5-B, 5-F and 5-H, and the suspension of the respondent Haber from the practice of law for a period of two years with respect to charges 5-B, 5-F and 5-H. Petitioner now moves: (1) to conform the referee's report with respect to the referee's findings as to charges 5-A, 5-B, 5-D, 5-F and 5-H; and (2) to disaffirm the report only in so far as the referee found three of the charges (5-C, 5-E and 5-I) not to be sustained, and in so far as he recommended their dismissal. Apparently, petitioner is content to rest on the referee's recommendation of dismissal of charge 5-A in so far as the respondent Haber is concerned, and on the

referee's recommendation of dismissal of charges 5-D and 5-G. The respondents have each made a cross-motion to affirm in part and to disaffirm in part the referee's findings, and to dismiss the petition. The charges which the referee sustained are: (1) that respondent Zuckerman deliberately refused to co-operate with the court in its efforts to expose unethical practices and to determine whether he had committed any acts of professional misconduct which destroyed the character and fitness required of him as a condition to his retention of the privilege of remaining a member of the Bar [5-A]; (2) that both respondents submitted misleading, exaggerated and false medical bills and statements covering lost time and earnings for the purpose of inducing various insurance companies to part with money in reliance thereon [5-B]; (3) that both respondents have "built up medical bills, for submission to Insurance companies by referring claimants to a succession of doctors," etc. [5-F]; (4) that both respondents, improperly and in violation of the Canons of Ethics, used investigators to obtain signed retainers, to obtain adversaries' statements from parties represented by attorneys, and to obtain the claimants' signatures on blank forms for the appointment of guardians ad litem [5-H]. In our opinion, charge or specification 5-A is amply sustained by the proof in so far as respondent Zuckerman is concerned. We are also of the opinion that as to both respondents the three charges or specifications 5-B, 5-F and 5-H are amply sustained by the proof. We approve the referee's findings that charges 5-C, 5-D, 5-E, 5-G and 5-I have not been sustained by the proof. Charge 5-C is that respondents made gifts of United States Government bonds and cash to referrers of cases; charge 5-D

is that the respondents made payments to others than attorneys in effecting the settlement of negligence cases; charge 5-E is that respondents failed fully and properly to name referrers in statements of retainer; charge 5-G is that the respondents settled infants' claims without court orders; and charge 5-I is that the respondents stirred up litigation by having insurance brokers, doctors, automobile repairmen, police officers, bond recipients and others solicit and refer claims to the respondents' law firm of Zuckerman and Haber. Accordingly, that part of petitioner's motion to affirm the referee's findings as to the four charges: 5-A, 5-B, 5-F and 5-H is granted; and that part of the petitioner's motion to disaffirm the referee's findings as to charges 5-C, 5-E and 5-I is denied. The respondent Zuckerman is found guilty of charges 5-A, 5-B, 5-F and 5-H; and, based upon such guilt, the said respondent is disbarred and his name directed to be struck from the roll of attorneys, effective thirty days after entry of the order hereon. The respondent Haber is found guilty of charges 5-B, 5-F and 5-H, and, based upon such guilt, he is suspended from the practice of law for a period of five years, commencing thirty days after entry of the order hereon. The respondents' cross-motions in so far as they seek a dismissal of the petition are denied; and respondents' cross-motions in so far as they seek to affirm in part and to disaffirm in part the referee's findings are dismissed as unnecessary in view of the disposition made upon the petitioner's motion.

Notice of Appeal

SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION—SECOND DEPARTMENT

[SAME TITLE]

SIRS:

PLEASE TAKE NOTICE, that the respondent Landon Zuckerman hereby appeals to the Court of Appeals as of right from an order of disbarment dated on the 3rd day of March 1, 1965, entered in the Office of the Clerk of the Appellate Division, Second Department, on the 11th day of March, in that said order is violative of the 14th Amendment to and Article 1 section 10, of the Constitution of the United States and Article 1 section 8, of the Constitution of the State of New York, and does hereby appeal from each and every part of said order.

Yours, etc.,

LEONARD FELDMAN
Attorney for Respondent
Office & P. O. Address
350—5th Ave.,
New York, N. Y. 10001

To:

SAMUEL GREASON, Esq.,
Chief Counsel
Judicial Inquiry on Professional Conduct,
821 Franklin Avenue,
Garden City, New York.

Clerk of Appellate Division
Second Department

Order on Motion for Reargument or for Leave to Appeal to the Court of Appeals

At a Term of the Appellate Division of the Supreme Court of the State of New York held in and for the Second Judicial Department at the Borough of Brooklyn, on the 15th day of April, 1965

Present—Hon. MARCUS G. CHRIST, Acting Presiding Justice
" ARTHUR D. BRENNAN,
" L. BARRON HILL,
" SAMUEL RABIN,
" JAMES D. HOPKINS, Justices.

[SAME TITLE]

The above named Landon Zuckerman, having been disbarred from the practice of law, by order of this court, dated March 3, 1965 and entered March 11, 1965 such disbarment commencing thirty days after entry of said order, and the respondent having moved for reargument or for leave to appeal to the Court of Appeals, by notice of motion, dated March 29, 1965.

Now on reading and filing the affidavit of Leonard Feldman in support of said motion and the affidavit of Samuel Greason in opposition thereto and the said motion having been submitted by Mr. Leonard Feldman of Counsel for respondent and submitted by Mr. Samuel Greason, petitioner, appearing in person, and due deliberation having been had thereon:

It is Ordered that the motion for reargument or for leave to appeal to the Court of Appeals be and the same hereby is denied.

Enter:

JOHN J. CALLAHAN
Clerk

Order on Motion for Reargument or for Leave to Appeal to the Court of Appeals and for a Stay

At a Term of the Appellate Division of the Supreme Court of the State of New York held in and for the Second Judicial Department at the Borough of Brooklyn, on the 15th day of April, 1965.

Present—Hon. MARCUS G. CHRIST, Acting Presiding Justice
" ARTHUR D. BRENNAN,
" L. BARRON HILL,
" SAMUEL RABIN,
" JAMES D. HOPKINS, Justices.

[SAME TITLE]

The above named Sam Haber, having been suspended from the practice of law for a period of five years, by order of this court, dated March 3, 1965 and entered March 11, 1965, such suspension commencing thirty days after entry of said order, and the respondent having moved for reargument or for leave to appeal to the Court of Appeals and for a stay, by notice of motion, dated March 29, 1965.

Now on reading and filing the statement of Michael Caputo in support of said motion and the affidavit of Samuel Greason in opposition thereto; and the said motion having been submitted by Mr. Michael Caputo of Counsel for respondent and submitted by Mr. Samuel Greason, petitioner, appearing in person, and due deliberation having been had thereon:

It is Ordered that the motion for reargument or for leave to appeal to the Court of Appeals and for a stay be and the same hereby is denied.

Enter:

JOHN J. CALLAHAN
Clerk

Notice of Appeal

SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION—SECOND DEPARTMENT

[SAME TITLE]

SIRS:

PLEASE TAKE NOTICE, that the respondent Landon Zuckerman, hereby appeals to the Court of Appeals as of right from an order of disbarment dated the 3rd day of March, 1965, entered in the Office of the Clerk of the Appellate Division, Second Department, on the 11th day of March, 1965, in that said order is violative of the 14th Amendment to and Article 1, section 10, of the Constitution of the United States and Article 1, section 6, of the Constitution of the State of New York, and does hereby appeal from each and every part of said order.

Dated: New York, N. Y.
April 28, 1965

Yours, etc.,

LEONARD FELDMAN,
Attorney for Respondent,
Office & P. O. Address:
350—5th Avenue,
New York 1, N. Y.

To:

SAMUEL GREASON, Esq.,
Chief Counsel
Judicial Inquiry on Professional Conduct,
821 Franklin Avenue,
Garden City, New York.

Clerk of Appellate Division
Second Department

Notice of Appeal

SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION—SECOND DEPARTMENT

[SAME TITLE]

SIR:

PLEASE TAKE NOTICE, that the respondent Sam Haber hereby appeals to the Court of Appeals from each and every part of the order made March 3, 1965, by the Appellate Division, Second Department and entered March 11, 1965, suspending respondent Sam Haber from the practice of law for five years and from the whole thereof.

Dated: March 29, 1965.

MICHAEL CAPUTO
Attorney for Sam Haber
16 Court Street
Brooklyn 1, New York

To:

SAMUEL GREASON, Esq.
Petitioner
821 Franklin Avenue
Garden City 1, New York

Order Dismissing Appeal of Petitioner Sam Haber

STATE OF NEW YORK

IN COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the Twenty-first day of October A. D. 1965.

Present—Hon. CHARLES S. DESMOND, Chief Judge, presiding.

Mo. No. 816

In the Matter of

SAM HABER, An Attorney.

SAMUEL GREASON,

Respondent,

SAM HABER,

Appellant.

A motion having heretofore been made upon the part of the respondent to dismiss the appeal taken by the appellant in the above cause to this Court and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is granted and the appeal dismissed upon the ground that no substantial constitutional question is presented.

[SEAL]

A copy

GEARON KIMBALL
Deputy Clerk

Order Dismissing Appeal of Petitioner Landon Zuckerman

STATE OF NEW YORK,

IN COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the Twenty-first day of October A. D. 1965.

Present—Hon. CHARLES S. DESMOND, Chief Judge, presiding.

[SAME TITLE]

A motion having heretofore been made herein upon the part of the respondent to dismiss the appeal taken by the appellant in the above cause to this Court, papers having been submitted in support of and in opposition to said motion, and after having heard Leonard Feldman, Esq., argue orally in opposition thereto, and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is granted and the appeal dismissed upon the ground that no substantial constitutional question is presented.

A copy

GEARON KIMBALL
Deputy Clerk

FILED
MAR 7 1966
JOHN F. DAVIS, CLE

IN THE

Supreme Court of the United States

OCTOBER TERM—~~1965~~ 1966

No. [redacted] 71

IN THE MATTER

of

LANDON ZUCKERMAN and SAM HABER,

Petitioners,

against

SAMUEL GREASON,

Respondent.

TO THE HONORABLES, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

SAMUEL GREASON,
Respondent,
Chief Counsel,
Judicial Inquiry on Professional Conduct,
821 Franklin Avenue,
Garden City, New York 11530.

INDEX

	PAGE
Index to Appendix	ii
Opinion Below	1
Proceedings Below	2
Statutes Involved	5
Statement	7
ARGUMENT	17
Conclusion	20

CASES CITED

Anonymous Nos. 6 & 7 v. *Baker*, 360 U. S. 287; 79 S. Ct. 1157 (1959) 17, 18

Cohen v. *Hurley*, 366 U. S. 117, 81 S. Ct. 954 (1961) (Rehearing denied, 374 U. S. 857, 83 S. Ct. 1860) 19

STATUTES, RULES AND CANON OF ETHICS CITED

Canon No. 9, Canons of Professional Ethics, Appendix to New York Judiciary Law 5

Judiciary Law, State of New York, Section 90, subdivisions 2 and 7 6

Special Rules of the Appellate Division, Second Department, adopted July 1, 1960, relating to conduct of attorneys—Rule 7 5

INDEX TO APPENDIX

	PAGE
Order of Disbarment of Petitioner, Landon Zuckerman, and Suspension of Petitioner, Sam Haber, dated March 3, 1965	1a
Opinion on Order of Disbarment and Suspension	6a
Notice of Appeal of Petitioner, Landon Zuckerman, to Court of Appeals	9a
Order on Motion by Petitioner, Landon Zuckerman, for Reargument or for Leave to Appeal to Court of Appeals, dated April 15, 1965	10a
Order on Motion by Petitioner, Sam Haber, for Reargument or for Leave to Appeal to the Court of Appeals and for a Stay	11a
Notice of Appeal by Petitioner, Landon Zuckerman, to Court of Appeals, dated April 28, 1965	12a
Notice of Appeal to Court of Appeals by Petitioner, Sam Haber, dated March 29, 1965	13a
Order of Court of Appeals Dismissing Appeal of Petitioner, Sam Haber	14a
Order of Court of Appeals Dismissing Appeal of Petitioner, Landon Zuckerman	15a

IN THE

Supreme Court of the United States

OCTOBER TERM—1965

No. 999/65

In the Matter of

LANDON ZUCKERMAN and SAM HABEB,

Petitioners,

against

SAMUEL GREASON,

Respondent.

TO THE HONORABLES, THE CHIEF JUSTICE OF THE UNITED STATES, AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Opinion Below

The opinion of the Appellate Division of the Supreme Court of the State of New York, Second Department, accompanied the order of the Appellate Division (A. 6a) reported in 23 A. D. 2d 825 (1965), 259 N.Y.S. 2d 963.

Proceedings Below

Petitioners, Zuckerman and Haber, were respondents in a disciplinary proceeding brought by Samuel Greason, Chief Counsel for the Judicial Inquiry on Professional Conduct for Nassau County, New York, on the order of the Appellate Division of the Supreme Court of the State of New York, Second Department. Separate, but identical, petitions were filed with the Appellate Division, Second Department.

Thereafter, on the Petitions, Answers and Bills of Particulars, the Appellate Division, Second Department, referred the matter to a Referee on September 25, 1961, for hearing, report and recommendation.

Hearings were held before the Referee on fifteen days between June 11, 1962 and November 15, 1963. Testimony totalled 1,884 pages, with 161 exhibits. Forty-eight witnesses testified.

The Referee's Report to the Appellate Division, Second Department, filed June 6, 1964, sustained Specifications 5A, 5B, 5F and 5H as to Zuckerman, and Specifications 5B, 5F and 5H as to Haber. The Appellate Division, Second Department, on March 3, 1965, unanimously confirmed the Referee's Report and disbarred Zuckerman and suspended Haber for five years (23 A. D. 2d 825; 259 N.Y.S. 2d 963).

Motions by Zuckerman and Haber to modify the Order were denied on March 23, 1965.

Thereafter, petitioners, Zuckerman and Haber, separately moved in the Appellate Division for reargument or leave to appeal to the Court of Appeals. The motions were denied on April 15, 1965, and thereafter, petitioners, Zuckerman and Haber, separately moved in the Court of Appeals for leave to appeal. These motions were denied (16 N. Y. 2d 482).

Petitioners, Zuckerman and Haber, separately moved in the Court of Appeals for leave to appeal on the original record in the Appellate Division, Second Department, and respondent cross-moved to dismiss the appeals on the ground that no substantial constitutional question was involved. The Court of Appeals, on October 21, 1965, denied petitioners' motions and granted the cross-motion to dismiss (16 N. Y. 2d 992).

The petitioners have submitted the following questions:

1. Can the same court investigate, determine to prosecute, prefer the charges against, prosecute and determine the guilt or innocence of an attorney and then discipline such attorney without being held to have denied due process to such attorney within the contemplation of the Constitution of the United States?

2. To what extent may an attorney be denied the simplest constitutional rights available to all others? In the absence of a statutory provision therefor, and contrary to the rights of all other citizens, may an attorney be disciplined for refusing to turn over possession of his personal records to a disciplinary investigation, and is discipline for such refusal a denial of due process and of the equal protection of the laws?

3. Is the simple assertion of the most basic constitutional right unavailable to an attorney? When, in response to a demand therefor, an attorney makes a full disclosure of his files and records to a disciplinary investigation, but, as all other citizens may do, asserts his constitutional privilege in aid of his refusal to turn over physical possession of all of his records, turnover of which was demanded without any showing of the relevancy of such turnover to the proceeding, may such attorney be disciplined for failing to "cooperate" in the absence of any statutory requirement

for such turnover, and is such discipline a denial of due process and the equal protection of the laws?

4. When, long prior to the adoption by two out of the four departments of the Appellate Division in New York of a special rule of conduct relating to the taking of an adversary *party* statement at a time when such adversary is represented by counsel, an independent third-party licensed investigator, without authorization from the attorney, takes a statement from a witness in the course of a preliminary investigation to determine the existence of a claim, may the attorney be disciplined by an *ex post facto* application and amplification of the rule, and is such discipline a denial of due process and the equal protection of the laws?

5. May a local court adopt a special rule of conduct applicable only to attorneys practicing within its local geographic limits the effect of which is to unfairly discriminate against such attorneys as compared to other attorneys practicing within the state and which discrimination also affects clients' rights to proper representation?

6. Where two separate disciplinary proceedings against two attorneys are consolidated for the purposes of trial and the trier of the facts fails to make a finding of wrongdoing as against either attorney (except, in the case of one of them, the refusal to turn over physical possession of records) and, with regard to the other charges, makes his findings in such manner as to make it impossible to tell what facts were found and as against which attorney, but concludes the guilt of each attorney, is the failure to make separate findings as to each attorney a denial of due process?

Statutes Involved

United States Constitution, Article I, Section 10:

"No State shall * * * pass any * * * ex post facto Law, * * *"

United States Constitution, Fourteenth Amendment:

"Section 1. * * * nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Constitution of the State of New York, Article I, Section 6 (as pertinent):

"No person shall be deprived of life, liberty or property without due process of law."

Special Rules of the Appellate Division, Second Department, adopted July 1, 1960, relating to conduct of attorneys:

"Rule 7

Prohibition of communication with adverse party.

No attorney shall communicate directly or indirectly upon the subject of any pending claim or action with an adverse party plaintiff or defendant known to him to be represented by attorney without the latter's knowledge and consent, nor shall he permit any claim agent or other representative of his client to interview an adverse party plaintiff or defendant or obtain any statement from him, or make any settlement with him without the knowledge and consent of the latter's attorney."

Canons of Professional Ethics, Canon 9 (Appendix to New York Judiciary Law):

"9. Negotiations With Opposite Party

A lawyer should not in any way communicate upon the subject of controversy with a party represented by

counsel; much less should he undertake to negotiate or compromise the matter with him, but should deal only with his counsel. It is incumbent upon the lawyer most particularly to avoid everything that may tend to mislead a party not represented by counsel, and he should not undertake to advise him as to the law."

Judiciary Law, State of New York, Section 90, subdivisions 2 and 7:

"2. The supreme court shall have power and control over attorneys and counsellors-at-law and all persons practicing or assuming to practice law, and the appellate division of the supreme court in each department is authorized to censure, suspend from practice or remove from office any attorney and counsellor-at-law admitted to practice who is guilty of professional misconduct, malpractice, fraud, deceit, crime or misdemeanor, or any conduct prejudicial to the administration of justice; and the appellate division of the supreme court is hereby authorized to revoke such admission for any misrepresentation or suppression of any information in connection with the application for admission to practice. * * *"

"7. It shall be the duty of any district attorney within a department, when so designated by the presiding justice of the appellate division of the supreme court, to prosecute all proceedings for the removal or suspension of attorneys and counsellors-at-law or the said presiding justice may, in a county wholly included within a city or in a county having a population of over three hundred thousand inhabitants, appoint an attorney and counsellor-at-law, designated by a duly incorporated bar association approved by him, to prosecute any such proceedings and, upon the termination of the proceedings, may fix the compensation to be paid to such attorney and counsellor-at-law for the

services rendered under such designation, which compensation shall be a charge against the county specified in his certificate and shall be paid thereon."

Statement

Affirmative findings by both the Referee and the Appellate Division against petitioner, Zuckerman, were:

"5A. The respondent has deliberately refused to cooperate with the Court in its efforts to expose unethical practices, and in its efforts to determine whether he has committed any acts of professional misconduct which destroyed the character and fitness required of him as a condition to his retention of the privilege of remaining a member of the bar."

"5B. The respondent Landon Zuckerman has submitted misleading, exaggerated and false medical bills and statements covering lost time and earnings for the purpose of inducing various insurance companies to part with money in reliance thereon."

"5F. The respondent Landon Zuckerman has built up medical bills for submission to insurance companies by referring claimants to a succession of doctors, orthopedists, neurosurgeons, etc."

"5H. The respondent Landon Zuckerman has improperly and in violation of the Canons of Ethics used investigators to sign up retainers, to obtain adversary statements from parties represented by attorneys, and by having blank guardian ad litem forms signed by claimants."

As to petitioner, Haber, both the Referee and the Appellate Division made affirmative findings only as to Charges 5B, 5F and 5H.

Regarding Charge 5A

The Referee's Report, considering Charge 5A as to petitioner, Zuckerman, analyzed the proceedings before Mr. Justice Gulotta, designated by the Appellate Division to preside over the investigation (Referee's Report, pp. 2-10).

On March 14, 1961, Zuckerman appeared before the Judicial Inquiry and produced at that time some of his files and check stubs for the year 1958, at which time the files were examined, as well as the check stubs and one checkbook. Zuckerman's attention was called to two specific checks, both dated March 27, 1958, each in the sum of $570.00, one to the order of Sol Bernstein and the other to the order of Edwin Carlton.

On March 22, 1961, both Zuckerman and Haber appeared before the Judicial Inquiry with their attorney, Mr. McCann, at which time there was a discussion as to the materiality of the documents to be examined.

On March 27, 1961, Mr. McCann called respondent, stated that Zuckerman's and Haber's financial records were under the scrutiny of the Internal Revenue Service and that, therefore, he could not and would not release them to the Judicial Inquiry (S.M. pp. 38, 39).

On April 28, 1961, Zuckerman, Haber and Mr. McCann appeared before Mr. Justice Frank A. Gulotta, Justice of the Supreme Court presiding at the Additional Special Term of the Judicial Inquiry hearings (S.M. pp. 40, 41, 42), who ordered Zuckerman and Haber to turn over to respondent herein, their files, books and various records pertaining to checks issued by them which they produced pursuant to a subpoena *duces tecum*, with the admonition that (S.M. p. 59):

> "The Court: Well, I am not so inclined to believe. And, as I mentioned before, I think, in view of the testimony that has gone before, the inquiry into these books and records is proper. And, as I also stated,

I think that as members of the bar these respondents have laid open in any inquiry of this type their entire conduct during the entire period that they have been practitioners before the bar. And with that in mind, all I can do is again repeat that if, in the course of the examination, they feel that any of their Constitutional rights have been or are about to be invaded, that they raise the question at that time."

Judge Gulotta also made the following statements (Transcript of Testimony, pp. 55, 56, 57):

"Mr. McCann, as I look at the situation, we are concerned in this Inquiry with the conduct of these attorneys and the desire to seek out the truth. If the truth hurts them, they must live with it. If it helps them, we are desirous of knowing it. And in that search for truth, these respondents should be prepared and willing to lay open their files and records and be candid with the Court.

"In the testimony that has been before the Court, there is a sufficient basis, I find, for the issuance of the subpoena, and it is not a subpoena which is issued merely for the purpose of going on a so-called fishing expedition. And to arrive at a proper and complete and just conclusion in this inquiry, I find that the examination of books and records, in view of the testimony that has gone before, are both relevant and material. And unless there be a question of Constitutional privilege raised, I shall order that they be turned over to Judge Greason for examination, and wherever some item that has been ordered produced is not produced that these respondents explain the reason for the non-production.

"Of course, if, unfortunately, they are caught between two or more inquiries, and their answer to one may in some way tend to incriminate them in the other, their Constitutional privileges will be safeguarded.

"Mr. McCann: I do not want your Honor to think, nor do I want this record to reflect that the respondents are even thinking about the books being such as would incriminate them. The question is, in your opinion, if you were to check every item of their financial records, were these proper charges. You might say they were proper charges. The Internal Revenue might say they were not proper charges.

"In your report to the Appellate Division, relevant to the financial aspect of the case, you might make a report on that which, in turn, the Appellate Division might forward to the Internal Revenue Service.

"That is the type of difference.

"The Court: Of course, we are anticipating something which may or may not happen. And our function here is merely to ascertain whether these lawyers have conducted themselves in conformity with the Canons of Ethics, and whether there has been misconduct, not in unearthing evidence that might or should be turned over the Revenue Service. So that, Mr. McCann, I think that justice will be served, and I think that when these respondents became members of the bar that they have laid before the Court everything that they do, and I think that they must be required to candidly explain their conduct in the practice of the law.

"And so, I shall, as I said before, order that they produce the items mentioned in the subpoena."

Mr. McCann, at the same time stated (Transcript of Testimony, pp. 57, 58):

"Well, of course, we have produced them, Judge.

"The question in my mind, your Honor has mentioned, I won't say by way of suggestion, the question of urging the Constitutional privileges that citizens generally possess, which I do not think we, as members of the bar, possess any longer, as far as that

provision of the Fifth Amendment that has to do with incriminations.

"However, I was wondering whether or not, in view of the magnitude of the request contained in the subpoena relative to the financial record of the respondents, whether or not that would not constitute an unreasonable search by judicial process. That Constitutional question I would like to urge before your Honor, both under the Fourth Amendment of the Constitution of the United States, and under Article 1, Section 12 of the Constitution of the State of New York.

"In making that motion, asking your Honor to consider, I am indeed mindful of the fact that this proceeding is considered, and in my opinion is a lawful proceeding. And therefore there would be, in my opinion, the additional factor that being a lawful proceeding the search is reasonable. But, I say, that the factor involved is individual items over a period of three years, the relevancy of which individually—now I am talking about the items when I say individually—has not been shown in this court. And, therefore, the question comes up, in mind, as to whether or not your Honor's ruling would not be somewhat unreasonable and constitute an unreasonable search by judicial process."

And then Judge Gulotta stated (S.M. p. 60):

"They have not answered any question yet, and the privilege is still open to them, and if you choose on Constitutional grounds that they not be examined, I stated to you before you may do so. On the other hand, you say that you want to lay open all their books. And if that be so, they will have a very competent advisor sitting alongside of them in the person of yourself to advise them as to their rights. And I am sure no rights of theirs will be invaded."

On May 19, 1961, Zuckerman and Haber appeared before Mr. Justice Gulotta and were again directed to bring the records to the Judicial Inquiry on May 22, 1961.

On May 22, 1961, Zuckerman appeared alone at the Judicial Inquiry office, stating: "I am taking my privilege." When Zuckerman returned at a later hour that day with Haber and Mr. McCann, Zuckerman again invoked the privilege and refused to produce the official financial records at the Judicial Inquiry (Transcript of Testimony, pp. 74 and 75).

On May 26, 1961, before Mr. Justice Gulotta, Zuckerman testified that he had in his possession the checkbooks and cancelled checks which had been brought pursuant to the subpoena, and restated his refusal of May 22, 1961, to answer any questions or to produce the specified checkbook for the period, February 14, 1958 to May 16, 1958, on the ground,

> "I respectfully refuse to do so and raise my privileges under the Constitution of the United States and the Constitution of the State of New York, and more particularly invoke my privilege under the Fourth, Fifth and Fourteenth Amendments of the United States Constitution, and Article 1, Section 1, 6 and 12 of the New York State Constitution."

Zuckerman invoked his Constitutional privileges on many other occasions (Transcript of Testimony, pp. 102-114).

When Zuckerman appeared before the Referee on September 20, 1962, he was asked this question (Transcript of Testimony, p. 612):

> "Q Mr. Zuckerman, with regard to your asserting the privilege, and with regard to your failure to answer certain questions which have been read into the record here, was it your purpose or intent to block or impede or in any way hinder the Judicial Inquiry from investigating into your affairs? A. No, sir, I did not

intend to impede them, but I do think there is a famous scientist says, 'Where law ends tyranny begins.' And I frankly think that they had no right to do it. And I think some attorney somewhere has got to stand up and take a stand. And six million of my countrymen died because one man would not take a stand. And I am going to take a stand."

Haber never invoked the Fifth Amendment or any other Constitutional Amendment. Instead, he made every effort to persuade Zuckerman to turn over to the Judicial Inquiry and to Mr. Justice Gulotta the records and checks and check stubs that were subpoenaed and also tried to persuade him to relinquish possession of these documents.

On May 8, Mr. McCann sent a statement to the Judicial Inquiry on behalf of Zuckerman. This statement was read into the record of the Judicial Inquiry by respondent, in the presence of Haber. In the statement, Zuckerman gave his legal reasons for refusing to turn over the financial information demanded (Ex. 5, Transcript of Testimony, p. 67).

Haber objected to Zuckerman's statement and refused to join in it and stated that he disagreed with it (Transcript of Testimony, pp. 69 and 74).

Haber advised Mr. Justice Gulotta that the checks and check stubs were not in his possession nor available to him and that Zuckerman had taken physical possession of them (Transcript of Testimony, p. 527), and that he was willing to comply with the Order of Mr. Justice Gulotta but was unable to do so. Mr. Justice Gulotta suggested to Haber that he consult the Partnership Law to ascertain ways and means of obtaining possession of these records (Transcript of Testimony, p. 529).

Haber made a research into the law and could not ascertain any remedy that he might pursue. He also conferred with counsel, who informed him that he knew of no pro-

ceeding that he could bring against Zuckerman (Transcript of Testimony, pp. 527, 528).

The Referee's findings (Referee's Report, pp. 10 and 11) were as follows:

> "I find that Mr. Haber answered every question propounded of him, without objection, and was at all times ready and willing to turn over to the Judicial Inquiry any books, records of financial data. Mr. Haber had no knowledge or information that Mr. Zuckerman would refuse to turn over the records requested by the Judicial Inquiry, and that he emphatically disagreed with Mr. Zuckerman's position of refusing to answer and turning over the records requested by the Judicial Inquiry (S.M. p. 529).
>
> "I find that Mr. Haber did nothing, in my opinion, to impede the investigation, and I recommend that the charge against him be dismissed.
>
> "Insofar as Mr. Zuckerman is concerned, I find that he did impede the investigation and his refusal to answer before the Judicial Inquiry was not in good faith.
>
> "It is, therefore, my opinion that the respondent Zuckerman's course of conduct before the Additional Special Term was contumacious and designed to obstruct the investigation. The respondent Zuckerman, as the Supreme Court held in the *Cohen* case, had a special duty as a lawyer to cooperate with the Court of Inquiry and answer questions relating to his professional conduct, and he did not in such connection have the right to invoke the Fifth Amendment.
>
> "I find that this charge against the respondent Zuckerman has been sustained."

The testimony conclusively establishes that petitioner Zuckerman's course of conduct was designed to obstruct the investigation and that he deliberately refused to cooperate with the Court.

Regarding Charges 5B and 5F

The Referee's Report exhaustively treated and considered the testimony and evidence against the petitioners on these two charges (Referee's Report, pp. 18 to 45). The Referee found the charges to be sustained as to both petitioners, Zuckerman and Haber, by a fair preponderance of the evidence and the reasonable inferences to be drawn therefrom (Referee's Report, p. 45).

Regarding Charge 5H

This specification charged the petitioners herein, Zuckerman and Haber, in violation of the Canons of Ethics, of using investigators to sign up retainers, to obtain adversary statements from parties represented by attorneys, etc.

The Bill of Particulars, in paragraph 13, pages 13 to 16, detailed the cases and the acts complained of. The testimony in the *Cox* matter showed that Rodau, the investigator, had, on May 27, 1959 (the date of the accident), taken a statement from Mary Cox, the driver of one of the cars involved in the accident, after seeing Mrs. Scott, the client of Zuckerman and Haber, at the Glen Cove Hospital. This statement was forwarded to Zuckerman and Haber (Transcript of Testimony, pp. 1320, 1321).

On May 27, 1959, the same date as Rodau's visit to the hospital, the attorney for Mary Cox, by letter, demanded of Zuckerman and Haber the surrender of the Cox statement, pointing out specifically that there was a violation of the Penal Law in taking the statement at the hospital. On May 29, 1959, the statement was returned, by letter, to counsel with a request that it be returned to them "if you ever settle your case" (Ex. 101; Transcript of Testimony, p. 1336).

Unsigned statements of Schlosser and Martin (Transcript of Testimony, pp. 1356 and 1359) were received from Rodau by Zuckerman and Haber.

Statements of adversary parties—

Ciambrone (Transcript, p. 1364); Pepper (Transcript, p. 1365); and Cimonetti (Transcript, p. 1367)

were received by Zuckerman and Haber from Rodau, although the persons named were represented by attorneys.

Although the Referee's Report, at page 52, notes "that Zuckerman and Haber have improperly and in violation of the Canons of Ethics, * * *" the Referee adverts to Special Rule 7 of the Appellate Division, Second Department (Referee's Report, pp. 53, 54).

The Appellate Division, in its Opinion on the Order of Disbarment and Suspension (Appendix 6a), specifically found that Specification 5H was amply sustained by the proof. Despite the Referee's misnomer as to Specification 5H, the charge against Zuckerman and Haber and the finding of the Appellate Division was a violation of Canon 9, Canons of Professional Ethics.

Incidentally, it is necessary to comment that the Appellate Division, Second Department, found it necessary to promulgate Rule 7, effective July 1, 1960, because of the disregard shown by attorneys for the prohibition contained in Canon 9 of the Canons of Professional Ethics (which had been in effect since 1909, as amended to April 1, 1948).

Rule 7 is merely a repetition and amplification of Canon 9, as appears from a reading of the Canon and the Rule.

ARGUMENT

POINT I.

Petitioners claim, under "Question 1" and "Reasons for Allowance of the Writ—1." that the Appellate Division, Second Department is the investigator, the prosecutor, and then passes on the guilt or innocence of the attorneys.

As in the Brooklyn "ambulance chasing" Judicial Inquiry, referred to by this Court in *Anonymous* v. *Baker*, 360 U. S. 287, the Judicial Inquiry in Nassau County was instituted in 1959 by the Appellate Division, Second Department on the Application of the Bar Association of Nassau County, and respondent herein was nominated by the Bar Association of Nassau County and appointed by the Appellate Division as Chief Counsel. This Order directed that a judicial inquiry and investigation be made, pursuant to New York State Constitution, Article VI, Section 2; Judiciary Law, Sections 90, 86, as to:

1. The alleged improper practices by attorneys and counsellors at law in Nassau County;
2. The alleged corrupt and unethical practices by attorneys and counsellors at law in Nassau County, in the solicitation of retainers, in the subsequent prosecution and disposition of claims and actions, and in any other matters;
3. Any and all other practices by attorneys and counsellors at law in Nassau County, involving professional misconduct, fraud, deceit, corruption and crime; and
4. Any and all conduct by attorneys and counsellors at law in Nassau County, prejudicial to the administration of justice.

The petitioners, pursuant to the Special Rule Regulating the Conduct of Attorneys and Counsellors at Law, had filed contingent retainers in personal injury cases as follows:

1956	212
1957	270
1958	225
1959	178

This led to the investigation of petitioners.

This Court, in *Anonymous* v. *Baker*, 306 U. S. 287, reviewed the nature of the proceedings as to discipline and removal of members of the Bar, placed by law in the Appellate Division of the Supreme Court (Sec. 90, Judiciary Law) and refused to find unconstitutional the procedures followed in such an inquiry.

There is no failure to meet constitutional standards of due process.

POINT II

Petitioners claim, under "Question 4," "Question 5" and "Reasons for Allowance of the Writ—2." that the application of Special Rule 7 by the Referee to Charge 5H was the application of an *"ex post facto"* law and constituted a violation of the constitutional rights of petitioners.

Charge 5H charged petitioners with a violation of the Canons of Ethics.

The proof before the Referee substantiated the charge (Transcript of Testimony, pp. 1320, 1321; 1355, 1359, 1364, 1365, 1366).

The Appellate Division in its Opinion on Order of Disbarment and Suspension, referring to Charge 5H, stated:

> "• • • that both respondents, improperly and in violation of the Canons of Ethics, used investigators to

obtain signed retainers, to obtain adversaries' statements from parties represented by attorneys * * *."

The Appellate Division had the Record as well as the Referee's Report before it and found that Charge 5H was amply sustained by the proof.

It is apparent that no attention was paid to the Referee's injection of Special Rule 7 into the proceeding.

POINT III

Regarding "Question 3," "Question 4" and "Reasons for Allowance of the Writ—3.", petitioner Zuckerman claims that his constitutional rights were violated when he was directed to permit examination of his files, checkbooks and checks.

Zuckerman had permitted the examination of a few files and a book of check stubs, but finally refused further examination and asserted his Constitutional privileges.

Petitioner Zuckerman makes much of the alleged confusion as to whether examination was sought or a turn over was required.

It is conclusively shows that an examination of the books and records was required.

There never was full disclosure by petitioner, Zuckerman, as the proof amply shows, and his action was disagreed with by Haber. (Transcript of Testimony, p. 529.) (Referee's Report, p. 10.)

See:

Cohen v. *Hurley*, 366 U. S. 117, 81 S. C. 954.

POINT IV

Regarding "Question 6" and "Reasons for Allowance of the Writ—4."

The Referee and the Appellate Division had the Record and the proof before them. The Referee found both petitioners guilty of Charges 5B, 5F and 5H, and absolved Haber of Charge 5A. The Appellate Division, after long and careful consideration of the Record and the Referee's Report, saw fit to follow the Referee's recommendations based on the proof.

The Appellate Division could confirm or disaffirm any finding of the Referee, and its ultimate decision is based on the proof alone.

CONCLUSION

The Petition for the granting of a Writ of Certiorari should be denied.

Respectfully submitted,

SAMUEL GREASON,
Respondent *Pro Se*,
Chief Counsel, Judicial Inquiry
on Professional Conduct.

WILLIAM F. HANRAHAN,
Assistant Counsel.

APPENDIX

Order of Disbarment of Respondent Landon Zuckerman, and Order of Suspension of Respondent Sam Haber.

At a Term of the Appellate Division of the Supreme Court of the State of New York held in and for the Second Judicial Department at the Borough of Brooklyn, on the 3rd day of March, 1965

Present—Hon. MARCUS G. CHRIST, Acting Presiding Justice
" ARTHUR D. BRENNAN,
" L. BARRON HILL,
" SAMUEL RABIN,
" JAMES D. HOPKINS, Justices.

[SAME TITLE]

Proceedings having been instituted by Samuel Greason, Esq., by petitions verified the 12th day of July, 1961, in respect to Landon Zuckerman, an attorney and counselor at law admitted by the Appellate Division of the Supreme Court, Second Judicial Department, on December 14, 1949, under the name of Landon R. Zuckerman; and in respect to Sam Haber, an attorney and counselor at law admitted by the Appellate Division of the Supreme Court, Second Judicial Department, on December 15, 1953, petitioning for orders directing that said respondents Landon Zuckerman and Sam Haber, as attorneys and counselors at law, be disciplined upon the charges set forth in said petitions and why such other and further action upon the charges embodied in said petitions, as justice may require, should not be had and for such other and further relief in the premises as may be just and proper, and the respond-

Order of Disbarment of Respondent Landon Zuckerman, and Order of Suspension of Respondent Sam Haber

ents having filed verified answers, and this court by orders dated and entered September 25, 1961, having referred the issues raised by the petitions and answers to George C. Wildermuth, Esq., as Referee, for hearings and reports, together with his recommendations, and the said Referee having held hearings and filed his report dated June 6, 1964 in this court on July 27, 1964, and the petitioner having moved by notice of motion, dated September 9, 1964 (1) to confirm the Referee's report with respect to the Referee's findings as to charges 5-A, 5-B, 5-D, 5-F and 5-H; and (2) to disaffirm the report only insofar as the Referee found three of the charges (5-C, 5-E and 5-I) not to be sustained, and insofar as he recommends their dismissal; and the respondents having each cross moved, by notices of cross motions dated September 14, 1964 and September 15, 1964 to affirm in part and to disaffirm in part the Referee's findings, and to dismiss the petitions.

Now on reading and filing the notice of motion of petitioner, the memorandum of petitioner, the petitions, answers, the report of George C. Wildermuth, Esq., the testimony and exhibits, notices of cross motions and memoranda of respondents, and all the papers filed herein, and Mr. Samuel Greason, petitioner, appearing in person, and Mr. Leonard Feldman appearing for respondent Landon Zuckerman, and Messrs. Caputo and Levine appearing for respondent Sam Haber, and due deliberation having been had thereon; and upon the opinion and decision slip of the court herein, dated March 3, 1965, heretofore filed, and made a part hereof: it is

Order of Disbarment of Respondent Landon Zuckerman, and Order of Suspension of Respondent Sam Haber

Ordered, that part of petitioner's motion to affirm the Referee's findings as to the four charges: 5-A, 5-B, 5-F and 5-H, be and the same hereby is granted; and that part of the petitioner's motion to disaffirm the Referee's findings as to charges 5-C, 5-E and 5-I, be and the same is denied; and it is further

Ordered that respondent Landon Zuckerman, admitted as Landon R. Zuckerman, is found guilty of charges 5-A, 5-B, 5-F and 5-H; and, based upon such guilt, the said respondent be and he hereby is disbarred from practice as an attorney and counselor-at-law in the State of New York, effective thirty days after entry of this order; and it is further

Ordered that the name of the said Landon Zuckerman, admitted as Landon R. Zuckerman, be struck from the roll of attorneys and counselors-at-law in the State of New York, effective thirty days after entry of this order; and it is further

Ordered, pursuant to the provisions of the Judiciary Law of the State of New York, that the said Landon Zuckerman, admitted as Landon R. Zuckerman, is hereby directed to desist and refrain from the practice of law in any form, either as principal or as agent, clerk or employee of another, and he is forbidden to appear as an attorney and counselor-at-law before any court, judge, justice, board, commission or other public authority, or to give to another an opinion as to the law, or its application, or any advice in relation thereto; and it is further

Order of Disbarment of Respondent Landon Zuckerman, and Order of Suspension of Respondent Sam Haber

Ordered that the respondent Sam Haber, be and he hereby is found guilty of charges 5-B, 5-F and 5-H, and, based upon such guilt, it is further

Ordered that the respondent Sam Haber, be and he hereby is suspended from the practice of law for a period of five years, commencing thirty days after entry of this order; and it is further

Ordered, pursuant to the provisions of the Judiciary Law of the State of New York, that the said Sam Haber is hereby directed to desist and refrain from the practice of law in any form, either as principal or as agent, clerk or employee of another, and he is forbidden to appear as an attorney and counselor-at-law before any court, judge, justice, board, commission or other public authority, or to give to another an opinion as to the law, or its application, or any advice in relation thereto; and it is further

Ordered that the suspension of said Sam Haber hereby ordered shall continue until the further order or orders of this court permitting the said Sam Haber to resume the practice of the law which may be granted upon proof that the said Sam Haber has not practiced law as hereinabove set forth in the State of New York during the period of suspension, and has been of good moral character, proof of such good character on the part of Sam Haber, to be of the same nature and form as is required of applicants for admission to the Bar; and it is further

Ordered that the respondents' cross motions insofar as they seek a dismissal of the petition be and the same are

Order of Disbarment of Respondent Landon Zuckerman, and Order of Suspension of Respondent Sam Haber

denied; and respondents' cross motions insofar as they seek to affirm in part and to disaffirm in part the Referee's findings be and the same hereby are dismissed as unnecessary in view of the disposition made upon the petitioner's motion.

Enter:

JOHN J. CALLAHAN
Clerk

Opinion on Order of Disbarment and Suspension.

(Filed March 3, 1965; published, N.Y.L.J. March 4, 1965)

By Christ, Acting P.J.; Brennan, Hill, Rabin and Hopkins, JJ.

Matter of Landon Zuckerman and Sam Haber, attorneys —This is a proceeding to discipline respondents, attorneys, based on nine charges or specifications of professional misconduct (Nos. 5-A to 5-I) arising out of the recent Judicial Inquiry into Unethical Practices of Attorneys in Nassau County. The special referee to whom the issues were referred has held extensive hearings and has filed his report. The referee found that one of the charges (5-A) was sustained in so far as the respondent Zuckerman was concerned, but recommended its dismissal as to the respondent Haber. As to both respondents, the referee found that three of the other charges (5-B, 5-F and 5-H) were sustained by the proof. The referee recommended dismissal of the remaining five charges (5-C, 5-D, 5-E, 5-G and 5-I). He recommended the respondent Zuckerman's disbarment on charges 5-A, 5-B, 5-F and 5-H, and the suspension of the respondent Haber from the practice of law for a period of two years with respect to charges 5-B, 5-F and 5-H. Petitioner now moves: (1) to conform the referee's report with respect to the referee's findings as to charges 5-A, 5-B, 5-D, 5-F and 5-H; and (2) to disaffirm the report only in so far as the referee found three of the charges (5-C, 5-E and 5-I) not to be sustained, and in so far as he recommended their dismissal. Apparently, petitioner is content to rest on the referee's recommendation of dismissal of charge 5-A in so far as the respondent Haber is concerned, and on the

referee's recommendation of dismissal of charges 5-D and 5-G. The respondents have each made a cross-motion to affirm in part and to disaffirm in part the referee's findings, and to dismiss the petition. The charges which the referee sustained are: (1) that respondent Zuckerman deliberately refused to co-operate with the court in its efforts to expose unethical practices and to determine whether he had committed any acts of professional misconduct which destroyed the character and fitness required of him as a condition to his retention of the privilege of remaining a member of the Bar [5-A]; (2) that both respondents submitted misleading, exaggerated and false medical bills and statements covering lost time and earnings for the purpose of inducing various insurance companies to part with money in reliance thereon [5-B]; (3) that both respondents have "built up medical bills, for submission to Insurance companies by referring claimants to a succession of doctors," etc. [5-F]; (4) that both respondents, improperly and in violation of the Canons of Ethics, used investigators to obtain signed retainers, to obtain adversaries' statements from parties represented by attorneys, and to obtain the claimants' signatures on blank forms for the appointment of guardians ad litem [5-H]. In our opinion, charge or specification 5-A is amply sustained by the proof in so far as respondent Zuckerman is concerned. We are also of the opinion that as to both respondents the three charges or specifications 5-B, 5-F and 5-H are amply sustained by the proof. We approve the referee's findings that charges 5-C, 5-D, 5-E 5-G and 5-I have not been sustained by the proof. Charge 5-C is that respondents made gifts of United States Government bonds and cash to referrers of cases; charge 5-D

is that the respondents made payments to others than attorneys in effecting the settlement of negligence cases; charge 5-E is that respondents failed fully and properly to name referrers in statements of retainer; charge 5-G is that the respondents settled infants' claims without court orders; and charge 5-I is that the respondents stirred up litigation by having insurance brokers, doctors, automobile repairmen, police officers, bond recipients and others solicit and refer claims to the respondents' law firm of Zuckerman and Haber. Accordingly, that part of petitioner's motion to affirm the referee's findings as to the four charges: 5-A, 5-B, 5-F and 5-H is granted; and that part of the petitioner's motion to disaffirm the referee's findings as to charges 5-C, 5-E and 5-I is denied. The respondent Zuckerman is found guilty of charges 5-A, 5-B, 5-F and 5-H; and, based upon such guilt, the said respondent is disbarred and his name directed to be struck from the roll of attorneys, effective thirty days after entry of the order hereon. The respondent Haber is found guilty of charges 5-B, 5-F and 5-H, and, based upon such guilt, he is suspended from the practice of law for a period of five years, commencing thirty days after entry of the order hereon. The respondents' cross-motions in so far as they seek a dismissal of the petition are denied; and respondents' cross-motions in so far as they seek to affirm in part and to disaffirm in part the referee's findings are dismissed as unnecessary in view of the disposition made upon the petitioner's motion.

Notice of Appeal.

SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION—SECOND DEPARTMENT

[SAME TITLE]

SIRS:

PLEASE TAKE NOTICE, that the respondent Landon Zuckerman hereby appeals to the Court of Appeals as of right from an order of disbarment dated on the 3rd day of March 1, 1965, entered in the Office of the Clerk of the Appellate Division, Second Department, on the 11th day of March, in that said order is violative of the 14th Amendment to and Article 1 section 10, of the Constitution of the United States and Article 1 section 8, of the Constitution of the State of New York, and does hereby appeal from each and every part of said order.

Yours, etc.,

LEONARD FELDMAN
Attorney for Respondent
Office & P. O. Address
350—5th Ave.,
New York, N. Y. 10001

To:

SAMUEL GREASON, Esq.,
Chief Counsel
Judicial Inquiry on Professional Conduct,
821 Franklin Avenue,
Garden City, New York

Clerk of Appellate Division
Second Department

Order on Motion for Reargument or for Leave to Appeal to the Court of Appeals.

At a Term of the Appellate Division of the Supreme Court of the State of New York held in and for the Second Judicial Department at the Borough of Brooklyn, on the 15th day of April, 1965

Present—Hon. MARCUS G. CHRIST, Acting Presiding Justice
" ARTHUR D. BRENNAN,
" L. BARRON HILL,
" SAMUEL RABIN,
" JAMES D. HOPKINS, Justices.

[SAME TITLE]

The above named Landon Zuckerman, having been disbarred from the practice of law, by order of this court, dated March 3, 1965 and entered March 11, 1965 such disbarment commencing thirty days after entry of said order, and the respondent having moved for reargument or for leave to appeal to the Court of Appeals, by notice of motion, dated March 29, 1965.

Now on reading and filing the affidavit of Leonard Feldman in support of said motion and the affidavit of Samuel Greason in opposition thereto and the said motion having been submitted by Mr. Leonard Feldman of Counsel for respondent and submitted by Mr. Samuel Greason, petitioner, appearing in person, and due deliberation having been had thereon:

It is Ordered that the motion for reargument or for leave to appeal to the Court of Appeals be and the same hereby is denied.

Enter:

JOHN J. CALLAHAN
Clerk

Order on Motion for Reargument or for Leave to Appeal to the Court of Appeals and for a Stay.

At a Term of the Appellate Division of the Supreme Court of the State of New York held in and for the Second Judicial Department at the Borough of Brooklyn, on the 15th day of April, 1965.

Present—Hon. MARCUS G. CHRIST, Acting Presiding Justice
" ARTHUR D. BRENNAN,
" L. BARRON HILL,
" SAMUEL RABIN,
" JAMES D. HOPKINS, Justices.

[SAME TITLE]

The above named Sam Haber, having been suspended from the practice of law for a period of five years, by order of this court, dated March 3, 1965 and entered March 11, 1965, such suspension commencing thirty days after entry of said order, and the respondent having moved for reargument or for leave to appeal to the Court of Appeals and for a stay, by notice of motion, dated March 29, 1965.

Now on reading and filing the statement of Michael Caputo in support of said motion and the affidavit of Samuel Greason in opposition thereto; and the said motion having been submitted by Mr. Michael Caputo of Counsel for respondent and submitted by Mr. Samuel Greason, petitioner, appearing in person, and due deliberation having been had thereon:

It is Ordered that the motion for reargument or for leave to appeal to the Court of Appeals and for a stay be and the same hereby is denied.

Enter:

JOHN J. CALLAHAN
Clerk

Notice of Appeal.

SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION—SECOND DEPARTMENT

[SAME TITLE]

SIRS:

PLEASE TAKE NOTICE, that the respondent Landon Zuckerman, hereby appeals to the Court of Appeals as of right from an order of disbarment dated the 3rd day of March, 1965, entered in the Office of the Clerk of the Appellate Division, Second Department, on the 11th day of March, 1965, in that said order is violative of the 14th Amendment to and Article 1, section 10, of the Constitution of the United States and Article 1, section 6, of the Constitution of the State of New York, and does hereby appeal from each and every part of said order.

Dated: New York, N. Y.

April 28, 1965

Yours, etc.,

LEONARD FELDMAN,
Attorney for Respondent,
Office & P. O. Address:
350—5th Avenue,
New York 1, N. Y.

To:

SAMUEL GREASON, Esq.,
Chief Counsel
Judicial Inquiry on Professional Conduct,
821 Franklin Avenue,
Garden City, New York

Clerk of Appellate Division
Second Department

Notice of Appeal.

SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION—SECOND DEPARTMENT

[SAME TITLE]

SIR:

PLEASE TAKE NOTICE, that the respondent Sam Haber hereby appeals to the Court of Appeals from each and every part of the order made March 3, 1965, by the Appellate Division, Second Department and entered March 11, 1965, suspending respondent Sam Haber from the practice of law for five years and from the whole thereof.

Dated: March 29, 1965.

MICHAEL CAPUTO
Attorney for Sam Haber
16 Court Street
Brooklyn 1, New York

To:

SAMUEL GREASON, Esq.
Petitioner
821 Franklin Avenue
Garden City 1, New York

Order Dismissing Appeal of Petitioner Sam Haber.

STATE OF NEW YORK

IN COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the Twenty-first day of October A. D. 1965.

Present—Hon. CHARLES S. DESMOND, Chief Judge, presiding.

Mo. No. 816

In the Matter of

SAM HABER, An Attorney.

SAMUEL GREASON,

Respondent,

SAM HABER,

Appellant.

A motion having heretofore been made upon the part of the respondent to dismiss the appeal taken by the appellant in the above cause to this Court and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is granted and the appeal dismissed upon the ground that no substantial constitutional question is presented.

[SEAL]

A copy

GEARON KIMBALL
Deputy Clerk

Order Dismissing Appeal of Petitioner Landon Zuckerman.

STATE OF NEW YORK,

IN COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the Twenty-first day of October A. D. 1965.

Present—Hon. CHARLES S. DESMOND, Chief Judge, presiding.

[SAME TITLE]

A motion having heretofore been made herein upon the part of the respondent to dismiss the appeal taken by the appellant in the above cause to this Court, papers having been submitted in support of and in opposition to said motion, and after having heard Leonard Feldman, Esq., argue orally in opposition thereto, and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is granted and the appeal dismissed upon the ground that no substantial constitutional question is presented.

A copy

GEABON KIMBALL
Deputy Clerk

SUPREME COURT, U. S.

FILED

MAR 16 1966

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM—~~1965~~ 1966

No. [redacted] 71

IN THE MATTER OF

LANDON ZUCKERMAN and SAM HABER,
Petitioners,

against

SAMUEL GREASON,
Respondent.

TO THE HONORABLES, THE CHIEF JUSTICE OF THE UNITED STATES, AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

PETITIONERS' REPLY BRIEF

LEONARD FELDMAN,
Attorney for Petitioners,
350 Fifth Avenue,
New York, N. Y. 10001.

INDEX

PAGE

Matter of Anonymous Nos. 6 and 7 v. *Baker*, 360 U. S. 287, 79 S. Ct. 1157 (1959) 2

IN THE

Supreme Court of the United States

OCTOBER TERM—1965

No. 999

In the Matter of

LANDON ZUCKERMAN and SAM HABER,

Petitioners,

against

SAMUEL GREASON,

Respondent.

TO THE HONORABLES, THE CHIEF JUSTICE OF THE UNITED STATES, AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

PETITIONERS' REPLY BRIEF

It is no answer to this Honorable Court or to Petitioners to ignore the very real constitutional issues raised and attempt to suggest to the Court that because, in the opinion of Respondent, Petitioners did something wrong, they are undeserving of this Honorable Court's consideration.

With regard to Point I, Petitioners set forth a specific issue raised by a course of conduct which has been held to constitute a denial of due process. Respondent does not dispute the facts which clearly demonstrate that denial

and incorrectly states that this Court, in *Anonymous* v. *Baker,* 360 U. S. 287, 79 S. Ct. 1157, passed on the issue and approved the course followed. It did not.

In his Point II, Respondent refers to the Canons of Ethics without mentioning which canon is involved. As a matter of fact there is no such canon. As a matter of fact, the Referee only held that a violation of the Appellate Division's Special Rule 7 had occurred—and he did so by an improper extension of the Rule. The Appellate Division did not even mention the Canons, but simply endorsed the Referee's conclusions.

With regard to Point III, Respondent here, for the first time, asserts that there never was a "full disclosure." Manifestly, Respondent admits that there was a disclosure, but now disputes the extent thereof. The Referee grounded his determination on the failure of the Petitioner Zuckerman to turn over possession of the records. He equated this failure to turn over possession with a failure to disclose, in spite of the fact that the record clearly shows, and Respondent also now tacitly admits, that a disclosure had, in fact, taken place. The Appellate Division endorsed the Referee's Report without regard to the disclosure actually made.

Respondent's Point IV again tacitly admits that neither the Referee's Report nor the Appellate Division's opinion determined which of Petitioners did what. In spite of the fact that these were two separate proceedings requiring proof as against each individual Petitioner, both the Referee (contrary to the express stipulation on the record) and the Appellate Division indiscriminately lumped both Petitioners together and held them both guilty, without a word in the Referee's Report, or the Appellate Division's opinion or decision, as to what it was that either Petitioner did wrong.

Implicit in the Respondent's answer is the suggestion to this Honorable Court that attorneys in disciplinary proceedings are not entitled to the ordinary rules of procedure and constitutional rights available to the lowliest litigant. It is this issue which Petitioners have submitted to this Honorable Court.

CONCLUSION

It is respectfully submitted the petitions should be granted.

Respectfully submitted,

LEONARD FELDMAN,
Attorney for Petitioners.

SUPREME COURT, U.S.

FILED

MAR 1 1967

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM—1966

No. 71

In the Matter of

LANDON ZUCKERMAN and SAM HABER,

Petitioners,

against

SAMUEL GREASON,

Respondent.

TO THE HONORABLES, THE CHIEF JUSTICE OF THE UNITED STATES, AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES.

PETITION FOR REHEARING

HAROLD M. SPITZER,
Attorney for Respondent,
Chief Counsel,
Judicial Inquiry on Professional Conduct,
821 Franklin Avenue,
Garden City, New York 11530.

TABLE OF CONTENTS

	PAGE
Reasons for Granting Rehearing and Denying the Writ as to Petitioner Sam Haber	2
Conclusion	3
Certificate of Counsel	4

IN THE

Supreme Court of the United States

OCTOBER TERM—1966

No. 71

In the Matter of

LANDON ZUCKERMAN and SAM HABER,

Petitioners,

against

SAMUEL GREASON,

Respondent.

TO THE HONORABLES, THE CHIEF JUSTICE OF THE UNITED STATES, AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

PETITION FOR REHEARING OF DECISION AND ORDER WHICH GRANTED PETITION FOR WRIT OF CERTIORARI

The above named respondent, Samuel Greason, respectfully prays that this court grant a rehearing of its decision and order of February 13, 1967 which granted the petition for a writ of certiorari, vacated the judgment of the Appellate Division of the Supreme Court of New York, Second Judicial Department, and remanded the case

to that court for reconsideration in light of *Spevack* v. *Klein*, 385 U. S. 511, insofar as said decision and order may apply to Sam Haber, one of the above named petitioners.

Reasons for Granting Rehearing and Denying the Writ as to Petitioner Sam Haber

1. The petitioner, Sam Haber, is in an entirely different position than the petitioner, Landon Zuckerman, with respect to the doctrine enunciated in *Spevack* v. *Klein*. Attention is respectfully directed to a discussion of this matter contained in the brief of the respondent, Samuel Greason (pp. 13 and 14) heretofore filed in this court in opposition to the petition for writ of certiorari. As it is there pointed out, Mr. Haber did not at any time invoke the Fifth Amendment or any other Constitutional privilege. (Transcript of Testimony, p. 474 and pp. 524-529.) When Mr. Zuckerman gave his legal reasons for refusing to turn over the financial information demanded (Ex. 5, Transcript of Testimony, p. 67) Haber objected to Zuckerman's statement and refused to join in it and stated that he disagreed with it. (Transcript of Testimony, pp. 69 and 74.) As the Referee stated,

> "I find that Mr. Haber answered every question propounded of him, without objection, and was at all times ready and willing to turn over to the Judicial Inquiry any books, records of financial data. Mr. Haber had no knowledge or information that Mr. Zuckerman would refuse to turn over the records requested by the Judicial Inquiry, and that he emphatically disagreed with Mr. Zuckerman's position of refusing to answer and turning over the records requested by the Judicial Inquiry (s.m. p. 529)." (Referee's Report, p. 10.)

As a result, and quite properly, of course, only Mr. Zuckerman was found guilty of Specification 5A (failure to cooperate with the court, etc.).

2. Attention is respectfully called to the fact that the judgment of the Appellate Division of the Supreme Court of New York, Second Judicial Department applies to both Zuckerman and Haber, although Zuckerman was found guilty of four specifications and Haber of three specifications and different sanctions were imposed on each, namely, disbarment of Zuckerman and suspension for five years of Haber. If said judgment is vacated it would therefore be vacated as to Haber as well as Zuckerman. Reconsideration as to Haber in the light of *Spevack* v. *Klein* would be futile since the doctrine of that case does not apply to Haber.

CONCLUSION

For the reasons set forth above and in the brief in opposition to petition for writ of certiorari, it is respectfully urged that rehearing be granted and that upon such rehearing the writ be denied as to petitioner Sam Haber.

Respectfully submitted,

HAROLD M. SPITZER,
Attorney for Respondent,
Chief Counsel, Judicial Inquiry
on Professional Conduct.

Certificate of Counsel

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the rules of this court.

HAROLD M. SPITZER,
Counsel for Respondent.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966.

ZUCKERMAN ET AL. *v.* GREASON.

ON PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF NEW YORK, SECOND JUDICIAL DEPARTMENT.

No. 71. Decided February 13, 1967.

PER CURIAM.

The petition for a writ of certiorari is granted. The judgment is vacated and the case is remanded to the Appellate Division of the Supreme Court of New York, Second Judicial Department, for reconsideration in light of *Spevack* v. *Klein*, 385 U. S. 511.

MR. JUSTICE CLARK, MR. JUSTICE HARLAN, and MR. JUSTICE STEWART would affirm the judgment below for the reasons set forth in MR. JUSTICE HARLAN's dissenting opinion in *Spevack* v. *Klein*, 385 U. S. 520.

MR. JUSTICE WHITE dissents for the reasons stated in his dissenting opinion in *Garrity* v. *New Jersey*, and *Spevack* v. *Klein*, 385 U. S. 530.